

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.7 Presumptions

A. Civil Case—MRE 301

Insert the following text on page 32 immediately before subsection (B):

If evidence is introduced to rebut a presumption, “the presumption dissolves, but the underlying inferences remain to be considered by the jury[.]” *Ward v Consolidated Rail Corporation*, ___ Mich ___, ___ (2005). In *Ward*, the defendant introduced evidence that missing evidence was disposed of as part of a routine business practice, thereby rebutting the presumption that the missing evidence was intentionally made unavailable. Missing evidence only gives rise to an adverse presumption when the complaining party can establish intentional conduct showing fraud or a desire to suppress the truth. Thus, the Court held that “the trial court erred when it instructed the jury that it could draw an adverse inference, but failed to explain that no inference should be drawn if defendant had a reasonable excuse for its failure to produce the evidence.”

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text before the last paragraph on page 112:

In *People v Walker*, ___ Mich App ___, ___ (2005), the Court of Appeals held that a crime victim's statements to a neighbor and a police officer do not constitute "testimonial statements" for purposes of the Confrontation Clause. In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that pursuant to *Crawford v Washington*, 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

"We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

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Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the March 2005 update to this subsection:

In *People v Ware*, ___ Mich App ___, ___ (2005), the Court of Appeals stated in dicta that *Crawford v Washington*, 541 US 36 (2004), does not prohibit the admission of a witness’s statement under MRE 804(b)(6). MRE 804(b)(6) allows the admission of a statement against a party if that party has engaged in or encouraged wrongdoing that was intended to and did in fact make the declarant unavailable as a witness. In *Ware*, the defendant killed the victim and then stated to the witnesses “[i]f this shit go any further y’all next.” A witness failed to appear at trial, and her statements were admitted under MRE 804(b)(6). In affirming the trial court’s admission of the statements under MRE 804(b)(6), the Court of Appeals stated the following:

“[T]he United States Supreme Court in *Crawford v Washington*, 541 US 36[] (2004) sought to reinforce the criminal defendant’s Sixth Amendment right to confront a witness offered against him. *Crawford* is absent of language concerning the circumstances of a witness’s unavailability, when such unavailability was caused by the defendant. From a practical standpoint, it would be grossly unfair to allow a defendant in a criminal matter to cause an adverse witness to be unavailable, and then assert a Sixth Amendment violation arguing a *Crawford*-type violation. To allow otherwise would facilitate threats or acts by a criminal defendant, against a potential witness, in order to prohibit statements or testimony, and thereby grant a criminal defendant a ‘constitutional defense’ against all statements made by a witness who was unavailable at the time of trial.”

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

D. Cautionary Instruction—CJI 2d 5.6

On page 116, replace the first sentence in this subsection with the following text:

Whether to give a cautionary accomplice instruction is within the trial court's discretion. *People v Young*, ___ Mich ___, ___ (2005). In *Young*, the Court overturned the *McCoy** rule, which required the trial court to give the jury a cautionary instruction about accomplice testimony whenever requested by the defendant. Under *McCoy*, a trial court's failure provide the jury instruction required reversal of the conviction. According to the *Young* Court, MCL 768.29 clearly provides that the jury instructions are within the trial court's discretion.

**People v McCoy*, 392 Mich 231 (1974).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300 – 3.600)

3.62 Contracts

On page 253, before subsection (A), insert the following text:

Effective March 12, 2005, the Committee on Model Civil Jury Instructions adopted new jury instructions for use in contracts cases, M Civ JI 142.01–142.55. The new jury instructions may be viewed online at www.courts.mi.gov/mcji/adopted-instructions/ch142.htm.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

After the second paragraph of this subsection, add the following text:

“[A] sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional ‘substantial and compelling’ reasons by the sentencing court.” *People v Wiley*, ___ Mich ___, ___ (2005). “[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence.” *Id.*